

# The Unconstitutional Stub of Section 1441(c)

DOUGLAS D. MCFARLAND\*

In its never-ending quest for truth, justice, the American way, and the reduction of the federal court caseload, Congress just keeps aw hittlin' and aw hittlin' at diversity jurisdiction.<sup>1</sup> The knife cut deeply into separate claim removal jurisdiction in 1990. While a 'much-reduced federal question stub remains, no grain of constitutionality can be found in it.

## I. AN EXCEPTIONALLY BRIEF HISTORY

Separate claim removal jurisdiction, found in the United States Code, Title 28, section 1441(c), has a venerable history. Removal of separable controversies entered the panoply of federal court jurisdiction in 1866, allowing a diverse defendant to remove the separable portion of the case that pertained to

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\* Professor of Law, Hamline University School of Law; B.A. Macalester College, 1968; J.D. New York University, 1971; Ph.D. University of Minnesota, 1983. The author gratefully acknowledges a grant from the firm Briggs & Morgan to Hamline University that supported this research. The author recognizes Philip Sieff, Hamline 1985, for his earlier research assistance on portions of this Article.

<sup>1</sup> Authority for the federal courts to hear diversity cases was granted in Article III of the United States Constitution, which states, "The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . ." U.S. CONST. art. III, § 2. Congress acted immediately in the Judiciary Act of 1789 to implement this authority and grant the federal courts diversity jurisdiction, "[T]he circuit courts shall have original cognizance . . . where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Judiciary Act, ch. 20, § 11, 1 Stat. 73, 78 (1789). Today, the grant is found in 28 U.S.C. § 1332 (1988).

With the burgeoning of the federal caseload, opponents of diversity jurisdiction have, over the past half century, periodically argued that Congress should abolish it. A brief survey of views pro and con can be found in Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, LITIG., Fall 1980, at 38. So far, Congress has either rebuffed each attack outright or compromised by one of two methods. Sometimes, Congress increases the jurisdictional amount. The original amount of \$500 set by the Judiciary Act of 1789 was increased in 1887 to \$2000, in 1911 to \$3000, in 1958 to \$10,000, and in 1988 to \$50,000. Act of 1988, Pub. L. No. 100-702, Title II, § 201(a), 102 Stat. 4646 (codified at 28 U.S.C. § 1332 (1988)). Other times, Congress whittles an additional jurisdictional sliver from the diversity block. For example, since 1948 improper or collusive joinder to create diversity has been prohibited (28 U.S.C. § 1359 (1988)), since 1958 corporations have had dual citizenship (28 U.S.C. § 1332(c)(1) (1988)), and since 1988 the legal representative of the estate of a decedent has been deemed to be from the same state as the decedent (28 U.S.C. § 1332(c)(2) (1988)).

him.<sup>2</sup> Congress over the years amended the statute several times, and separate claim removal emerged in much its present form in the Judicial Code of 1948.<sup>3</sup> That statute allowed removal of the entire case in the following terms:

Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.<sup>4</sup>

Governing separate claim removal jurisdiction for forty-two years, the language had three noteworthy features: (1) the statute covered both federal question and diversity jurisdiction cases, (2) the statute required a separate and independent "claim or cause of action," and (3) the statute removed the "entire case."<sup>5</sup>

Congress revisited section 1441(c) in 1990 as part of its implementation of the recommendations of the Federal Courts Study Committee.<sup>6</sup> While the

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<sup>2</sup> Removal jurisdiction had existed since the Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80, but only for entire cases presenting complete diversity. Of course, clever plaintiffs named additional local defendants in order to prevent removal. This problem seemed especially acute following the Civil War, so Congress attempted to protect nonresident defendants by allowing removal of the *separable* portion of the case relating to them:

[I]f the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then and in every such case the alien defendant, or the defendant who is a citizen of a state other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next circuit court of the United States . . . .

Act of July 27, 1866, ch. 288, 14 Stat. 306, 306-07 (1868) (codified at 28 U.S.C. § 71 (amended 1948)).

<sup>3</sup> The history of the statute is traced in several sources. *E.g.*, 28 U.S.C. § 1441 reviser's note (Supp. V 1946); 14A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3724 (2d ed. 1985); William Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 MINN. L. REV. 1, 2-6 (1961); Bradford G. Swing, *Federal Common Law Power to Remand a Properly Removed Case*, 136 U. PA. L. REV. 583 (1987); Note, *The Constitutionality of Federal Removal Jurisdiction Over Separable Controversies Involving Citizens of the Same State*, 94 U. PA. L. REV. 239 (1946).

<sup>4</sup> 28 U.S.C. § 1441(c) (Supp. V 1946) (amended 1990).

<sup>5</sup> *Id.*

<sup>6</sup> Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089. The Federal Courts Study Committee had been created in 1988 to study the federal caseload and

Committee had recommended repeal of the section,<sup>7</sup> in part because of its general recommendation for the repeal of diversity jurisdiction,<sup>8</sup> Congress chose instead to whittle. It cut away diversity cases, leaving separate claim removal jurisdiction to operate only on federal question cases:

Whenever a separate and independent *claim or cause of action* within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the *entire case* may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.<sup>9</sup>

The amendment makes one change to the 1948 removal language, and one change only.<sup>10</sup> It eliminates diversity jurisdiction cases from separate claim removal jurisdiction. No change is made in the requirement of a “separate and independent claim or cause of action,” and no change is made in the provision for removal of the “entire case.”

The remainder—separate claim removal jurisdiction for federal question cases—is unconstitutional. This conclusion follows from the broad interpretations courts have properly placed on “claim or cause of action” and “case.” This Article now explores these interpretations in turn.

## II. THE EXTENT OF A “CLAIM OR CAUSE OF ACTION”

The cause of action fathered the claim. Like some fathers in the insect realm, this procedural father should not have survived the conception. To understand this, we explore first the limits of the cause of action.

The “cause of action” became a term of art when code pleading swept aside common law pleading in the states.<sup>11</sup> The term had been used only occasionally under the common law, which relied instead on the forms of action to limit pleading. With the adoption of state codes in the middle to late

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make recommendations for legislation. Pub. L. No. 100-702, §§ 102, 105, 102 Stat. 4644, 4644-45 (1988).

<sup>7</sup> FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 94-95 (1990). The Committee opined that section 1441(c) diversity cases produced needless procedural litigation, and accordingly recommended repeal of the entire section, or retention only if general diversity jurisdiction were eliminated. The symbiosis between the Committee and Congress is described in John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 736 n.2, 748-49 (1991).

<sup>8</sup> FEDERAL COURTS STUDY COMMITTEE, *supra* note 7, at 34.

<sup>9</sup> 28 U.S.C. § 1441(c) (Supp. II 1990) (emphasis added).

<sup>10</sup> The language governing remand is also altered, but this Article analyzes only initial removal.

<sup>11</sup> Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 820 (1924).

1800s, plaintiffs had to plead the facts constituting a "cause of action." As is well known, much procedural litigation resulted over whether the pleader had stated her cause of action in sufficient ultimate facts, or in insufficient legal conclusions or evidentiary facts.<sup>12</sup>

With the codes requiring a cause of action, the courts undertook the task of delineating one. Countless appellate opinions struggled to find an acceptable definition. Even the Supreme Court of the United States grappled with the phrase.<sup>13</sup> None were successful in finding a universal, everyday definition, although the effort continued into the 1930s.

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<sup>12</sup> CHARLES E. CLARK, CODE PLEADING § 38 (2d ed. 1947).

<sup>13</sup> Two opinions stand out. The Court's most comprehensive attempt to define cause of action is *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), a case in which an initial libel in admiralty was filed in federal court for an injury on board ship. The injured party prevailed, but for a small amount. *Id.* at 318. He tried again in state court, and was removed to federal court. The question was one of *res judicata*. The Court, through Justice Sutherland, said,

Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.

*Id.* at 321.

Six years later, Justice Benjamin Cardozo, exhibiting his characteristic distaste for abstract definitions, backed the Court away from a quest for a comprehensive definition of cause of action:

A "cause of action" may mean one thing for one purpose and something different for another. It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the application of the principle of *res judicata*. At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ. Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed. This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed.

*United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933) (footnotes and citations omitted).

Two major schools of thought on the "cause of action" emerged. Each had as its champion a respected law professor: Charles Clark of Yale and O.L. McCaskill of Cornell. These two combatants, together with a few squires, carried on a running battle through the law reviews for more than a decade.<sup>14</sup> The contours of the struggle can be seen from a simple tort hypothetical. A approaches B, (1) strikes B in the face, (2) calls B a horse thief, (3) grabs B's arm to prevent escape, and (4) takes money from B's wallet to pay for the horse. B can sue for (1) battery, (2) slander, (3) false imprisonment, and (4) conversion. Does B have one cause of action, or four causes of action?

Before answering the question, we should highlight the common law and code concept of "right of action." This concept grew out of the corresponding right-duty relationship between the injured party and the wrongdoer. An injury resulted in an unstated right of action. In the simple hypothetical, B has been injured by A in four distinct ways, so B has four rights of action against A.<sup>15</sup>

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<sup>14</sup> A good pairing to give the tenor of the battle is Clark, *supra* note 11, and O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925). Another exchange is Bernard C. Gavit, *A "Pragmatic Definition" of the "Cause of Action"?*, 82 U. PA. L. REV. 129 (1933); Charles E. Clark, *The Cause of Action*, 82 U. PA. L. REV. 354 (1934); Bernard C. Gavit, *The Cause of Action—A Reply*, 82 U. PA. L. REV. 695 (1934). Other volleys include Charles E. Clark, *Joinder and Splitting of Causes of Action*, 25 MICH. L. REV. 393 (1927); Bernard C. Gavit, *The Code Cause of Action: Joinder and Counterclaims*, 30 COLUM. L. REV. 802 (1930); Silas A. Harris, *What is a Cause of Action?*, 16 CAL. L. REV. 459 (1928); Oliver L. McCaskill, *The Elusive Cause of Action*, 4 U. CHI. L. REV. 281 (1937); Carl C. Wheaton, *The Code Cause of Action*, 22 CORNELL L.Q. 1 (1936). Stray shots continued even after the adoption of the Federal Rules of Civil Procedure in 1938; these are collected in S. Elizabeth Gibson, *Removal of Claims Related to Bankruptcy Cases: What is a "Claim or Cause of Action"?*, 34 UCLA L. REV. 1, 3 n.11 (1986).

<sup>15</sup> When one person wrongs another, the wronged person has an inchoate "right of action" against the wrongdoer, whether that right of action sounds in tort, contract, or any other area of the law. As Phillips put the matter,

Where there is a legal right, there is a remedy for its infraction to be obtained by means of an action in a court of justice. Therefore, when a legal right is wrongfully infringed, there accrues to the injured party a right to obtain the legal remedy, by action against the wrongdoer. This secondary or remedial right is called a right of action.

GEORGE L. PHILLIPS, CODE PLEADING § 186 at 168 (2d ed. 1932). Only when the facts are formally pleaded does this right of action become a cause of action. Citing Phillips, McCaskill stated this succinctly, "The unstated facts give a 'right of action,' but the stated facts give a 'cause of action.'" O.L. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 617 (1925).

Clark agreed with this view of right of action and carefully distinguished it from cause of action:

Because none of these facts has yet been stated in a complaint, B has as yet no cause(s) of action against A. Only when the facts are pleaded do we need to speak of cause(s) of action. While remaining inchoate, B has only four *rights of action*, that is, four legal theories of recovery against A.

So far, all agree.<sup>16</sup> Now we return to the original, controversial question: does B have one cause of action, or four causes of action, against A in a complaint alleging all four theories of recovery?

McCaskill answered that B has four causes of action. Drawing on earlier writers on code pleading,<sup>17</sup> McCaskill argued that a cause of action was the

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*Cause of action* is often used interchangeably with *right of action* and we must expect to find such usage wherever no occasion arises for making a distinction between them. But careful analysis would draw such a distinction . . . . A right of action has been defined as "the right to prosecute an action with effect." . . . But more generally it is used as meaning what we often term the "remedial right," that is the particular *right-duty* legal relation which is being enforced in the particular legal action under consideration. Such right-duty relation always exists when the plaintiff in a legal action is entitled to a favorable judgment. It seems clear that in the pleading sections of the Code of 1848, at least, the codifiers by *cause of action* meant something other than this right.

Clark, *supra* note 11, at 823-24 (footnotes omitted) (quoting *Jacobus v. Colgate*, 111 N.E. 837, 839 (1916) (Cardozo, J. )).

<sup>16</sup> See discussion *supra* note 15.

<sup>17</sup> In his treatise on code pleading, Pomeroy wrote of cause of action as follows:

Every judicial action must therefore involve the following elements: a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, *the primary right and duty and the delict or wrong combined constitute the cause of action* in the legal sense of the term, and as used in the codes of the several states.

JOHN N. POMEROY, CODE REMEDIES § 347 (4th ed. 1904) (emphasis added).

Phillips defined cause of action in this manner:

The formal statement of operative facts showing such right and such delict shows a *cause for action* on the part of the state and in behalf of the complainant, and is called in legal phraseology, a *cause of action*.

From the foregoing definitions of right of action and cause of action, it will be seen that the former is a remedial right belonging to some person, and that the latter is a formal statement of the operative facts that give rise to such remedial right. The one is

intersection of a single right and a single wrong, or in other words, a single theory of recovery. This is his "fairly accurate definition" of the cause of action: "It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded."<sup>18</sup> One can see that McCaskill's "cause of action" is virtually coextensive with the "right of action," or if expanded at all, it is limited and restricted by the legal right enforced. Consequently, McCaskill would have said that B has four causes of action.

Clark answered that B has one cause of action. The whole point of the fusion of law and equity in the codes, he said, was to rid pleading of the artificial distinctions of the forms of action by requiring only a statement of facts.<sup>19</sup> With the abolition of the forms of action, the codifiers understood some limitation on the litigation unit was necessary to avoid a confused mess. The unit they selected was the cause of action: "The essential thing is that there be chosen a factual unit, whose limits are determined by the time and sequence and unity of the happenings, rather than by some vague guess or prophecy of potential judicial action."<sup>20</sup> The important measuring stick thus was the convenient unit of facts, not the theory of recovery. This unit of facts, quite akin to the "transaction," might have one, or more than one, right-duty relations, that is, rights of action, embedded in it. Instead of the lawyer's perspective on pleading McCaskill favored, Clark favored a lay perspective: the

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matter of right, and depends upon the substantive law; the other is matter of statement, and is governed by the law of procedure.

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From one right of action—that is, from one primary right and one breach thereof,—may arise a right to two or more different kinds of relief, obtainable in one action. In such case there being but one right of action, there should be but one cause of action stated in a complaint asking for several kinds of relief.

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A complaint should state a separate cause of action for each right of action disclosed by the facts therein stated; and whatever facts would, if stated by themselves, entitle one to relief by action, constitute a right of action, and should be separately stated as one cause of action.

GEORGE L. PHILLIPS, CODE PLEADING §§ 30, 31, 210, 438 (1896).

<sup>18</sup> McCaskill, *supra* note 15, at 638 (1925). A large part of McCaskill's argument appears to stem from his fear that joinder of a legal "cause of action" and an equitable "cause of action" might be deemed to waive a jury trial. *Id.* at 631–32, 638. Even granting that this argument ever had any validity, it has none today following the decisions in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), and its progeny. See CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 92 (4th ed. 1983).

<sup>19</sup> Clark, *supra* note 11, at 825.

<sup>20</sup> CLARK, *supra* note 12, at 143.

"cause of action" was "such a group of facts . . . limited as a lay onlooker would to a single occurrence or affair, without particular reference to the resulting legal right or rights."<sup>21</sup> The lay perspective would group facts, not legal theories. The limit of the "cause of action" would therefore be a lay, pragmatic limit on what facts logically group together:

The cause of action under the code should be viewed as an aggregate of operative facts which give rise to one or more relations of right-duty between two or more persons. The size of such aggregate should be worked out in each case pragmatically with an idea of securing convenient and efficient dispatch of trial business.<sup>22</sup>

Applying this to our hypothetical plaintiff B, we see that while four theories of recovery, that is, four rights of action exist, all of this happened at one time and any nonlawyer would describe this as a single event. Clark would have maintained that B has one cause of action.

We should be aware of this ancient contest, but need not choose sides, for the contest was won in 1938 with the promulgation of the Federal Rules of Civil Procedure. Perhaps the winner was really chosen a few years earlier, in 1934, with the appointment of the advisory committee to draft the rules. Who should be chosen as reporter to the committee but Professor Charles Clark? What an opportunity to close the contest! And seize the opportunity he did. Under the leadership of Clark, the committee banished the term "cause of action" forever from the lexicon of pleading in the federal courts. The new term would be "claim for relief," or just "claim."<sup>23</sup> Quite clearly, the "claim" tracks closely Clark's definition of "cause of action:"

The variable character of 'cause of action' has been pointed out . . . . Because of its illusive character, that concept has been entirely omitted from the new rules; but a similar idea is conveyed . . . . These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Such lay view of a transaction or occurrence, the subject matter of a claim, is not a precise concept; its outer limits should depend to a considerable extent upon the purpose for which the concept is being immediately used.<sup>24</sup>

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<sup>21</sup> *Id.* at 130.

<sup>22</sup> Clark, *supra* note 11, at 837.

<sup>23</sup> FED. R. CIV. P. 8(a)(2) (stating, "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . .").

<sup>24</sup> CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE 658-59 (1940) (footnotes and citations omitted).



The claim is bounded by a lay sense of what events should logically be grouped together; it in no way is defined by legal rights of action. "There is no question but what in the Rules 'claim' was used to prevent 'cause of action' from being construed as McCaskill says the weight of authority construes it."<sup>25</sup>

So, in the federal courts and in the rules states that followed the federal lead, Clark had won. The claim was born and prospers today. The cause of action joined the ashheap of history.

Unfortunately, many judges just plain did not get it. Trained in the earlier system, they continued to use the obsolete phrase.<sup>26</sup> Perhaps the finest, or one should say the basest, example is the famous pleading case *Dioguardi v. Durning*,<sup>27</sup> decided six years after adoption of the Federal Rules. The pro se plaintiff's nearly unintelligible complaint was dismissed by the district judge under Rule 12(b)(6) "on the ground that it 'fails to state facts sufficient to constitute a cause of action.'"<sup>28</sup> The appeal went to the Second Circuit. Whether by serendipity or by another creative appointment, the case ended in the hands of a panel including Judge Charles Clark, who had doffed his academic mortarboard in favor of judicial robes. One can only imagine that upon seeing the file, Clark must have thought to himself, "If I could only die, then I would be able to spin in my grave." Resisting any impulse to harangue the district judge, Clark wrote a straight-forward opinion that the Federal Rules mean what they say. He patiently pointed out that the new rules make no requirement of pleading a cause of action, but require only "a short and plain statement of the claim."<sup>29</sup>

Maybe Clark should have loudly vented his frustration, because other judges and commentators over the years have kept repeating the incantation "cause of action,"<sup>30</sup> and even today some courts still do not get it.<sup>31</sup>

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<sup>25</sup> Arthur J. Keeffe et al., *Venue and Removal Jokers in the New Federal Judicial Code*, 38 VA. L. REV. 569, 610 (1952).

<sup>26</sup> This is hardly unexpected. Each new procedural system seems to be greeted with studied ignorance by lawyers and judges trained over a lifetime in the old ways. The predecessor of the rules had been received similarly. As one court stated, "The cold, not to say inhuman, treatment which the infant Code received from the New York judges is a matter of history." *McArthur v. Moffett*, 128 N.W. 445, 446 (Wis. 1910), *quoted in* Clark, *supra* note 11, at 830.

<sup>27</sup> 139 F.2d 774 (2d Cir. 1944).

<sup>28</sup> *Id.* at 774.

<sup>29</sup> *Id.* at 775 (quoting FED. R. CIV. P. 8(a)).

<sup>30</sup> Perhaps the most egregious example is found in a federal practice treatise: "While Rule 8(a) uses the term 'a claim for relief,' plaintiff must plead a legal right and its violation, which is what has always been denominated as a 'cause of action.'" 4 C. THOMPSON, *CYCLOPEDIA OF CIVIL PROCEDURE* § 14.157 (rev. vol. 1992). *See also* discussion *infra* note 61.

One court got it, and got it clearly. Some of the most famous decisions of the United States Supreme Court in the field of civil procedure clearly adopt the Clark theory.<sup>32</sup> None does so more explicitly than the only Court case to date interpreting section 1441(c) itself.

### III. AN ANALYSIS OF *FINN*

*American Fire & Casualty Co. v. Finn*<sup>33</sup> was decided in 1951, a time when the Federal Rules and their thinking about procedural issues had not yet become dominant. Even so, the opinion of the Court, authored by Justice Stanley Reed for a majority of six,<sup>34</sup> clearly adopts the Clark view of claim.

Plaintiff Finn, a Texas citizen, attempted to purchase fire insurance on his property through local agent Reiss, also a Texas citizen.<sup>35</sup> Finn alleged Reiss either negligently failed to place the insurance, or placed it with one of two foreign insurance companies, American Fire and Casualty, a Florida

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<sup>31</sup> The unsuccessful attempt by the judges of the Ninth Circuit to replace "claim for relief" with "cause of action" is discussed in Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 445 (1986).

<sup>32</sup> *Conley v. Gibson*, 355 U.S. 41 (1957), is best known for its expansive language against dismissal for failure to state a claim. The opinion also rejects the need for pleading specific facts in detail, and points to the official forms as a demonstration of the sketchy notice pleading that suffices to state a "claim" under the Federal Rules. *Conley* is an absolutely clear rejection of the McCaskill cause of action theory. *See id.* at 47. Recently the Court reaffirmed its commitment to *Conley* claim pleading in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993).

*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), is best known as a pendent jurisdiction case. In its adoption of federal jurisdiction over an entire "case," the opinion adopts the Clark theory of a single "claim" arising out of one transaction. The often quoted language is this:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

*Id.* at 725. This language echoes Clark. For a discussion of *Gibbs*, see *infra* text accompanying notes 72-78.

<sup>33</sup> 341 U.S. 6 (1951).

<sup>34</sup> The three dissenters did not disagree with the Court's analysis of the removal statute, but rather argued that defendants should be estopped from seeking remand to state court for a jurisdictional infirmity when they had sought the removal and then lost at trial in federal court. *Id.* at 19-21.

<sup>35</sup> *See id.* at 7-8.

corporation, or Indiana Lumbermens Mutual, an Indiana corporation.<sup>36</sup> When the property burned, Finn brought suit in Texas state court against (1) Reiss, (2) American Fire, and (3) Indiana Lumbermens, in the alternative. Because Finn and Reiss were of common citizenship, the case could not have been brought originally in federal court. The two insurance companies, of diverse citizenship from the plaintiff, nevertheless removed the case to federal court under section 1441(c),<sup>37</sup> they maintained that the theories against them in the alternative, even though they would result in only one recovery, were separate claims or causes of action, allowing removal of the entire case.<sup>38</sup>

The removed case was tried to a jury in the federal district court. American Fire lost the verdict. At that point, American Fire decided it had removed the case from state court improperly. It moved to remand. The district court denied the motion, and the Fifth Circuit agreed, holding that the plaintiff had asserted three claims or causes of action.<sup>39</sup> The claim or cause of action against each defendant was separate and independent, so the case had been properly removed. The Supreme Court reversed, and held that only a single claim was stated.<sup>40</sup>

Justice Reed noted the 1948 revision of separate claim removal, from “separable controversy” to “separate claim or cause of action,” and concluded that Congressional intent was not only to avoid interpretive difficulties but also to narrow the availability of removal jurisdiction.<sup>41</sup> With that mindset, he proceeded to interpret the statute.

While “cause of action” had supposedly been banished from the lexicon of federal procedure in 1938,<sup>42</sup> Congress inserted it into section 1441(c) in 1948. Consequently, the Court had to interpret “separate and independent claim or cause of action.” The key question was whether the plaintiff had asserted three theories against three defendants in one claim or in three claims. Of course the decision required was a vote on the old debate between Clark and McCaskill. The *Finn* opinion has a little for both sides, perhaps because it recognizes the admonition of Justice Cardozo that “cause of action” is a phrase of many meanings.<sup>43</sup> In the end, Clark emerged victorious, but the opinion is curious, probably made so because the statute is even curiouiser.

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<sup>36</sup> *Id.* at 14–15.

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *See id.*

<sup>39</sup> *Id.* at 7–8 (citing 181 F.2d 845 (1950) for the Circuit appeal).

<sup>40</sup> *Id.* at 16, 18–19.

<sup>41</sup> *Id.* at 9–10. The conclusion was based on the Reviser’s Note to the 1948 Judicial Code revision, which is quoted *infra* in the text accompanying note 53. *Finn*, 341 U.S. at 10 n.2.

<sup>42</sup> *See supra* text accompanying notes 23–25.

<sup>43</sup> *Finn*, 341 U.S. at 12 n.9. *See also supra* note 13.

The Court discusses the proper interpretation and application of the claim or cause of action language in section 1441(c) for some five pages.<sup>44</sup> While apparently believing the terms are synonymous,<sup>45</sup> in those five pages, the Court uses "cause of action" seventeen times and "claim" four times.<sup>46</sup> Score a point for McCaskill. He appears to score again with the Court's quotation, "'A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show.'"<sup>47</sup> This McCaskill point is illusory, however, for the quotation is from a case that actually held the plaintiff had suffered a single wrong and so had only a single cause of action.<sup>48</sup> The Court next adopts this single wrong criterion and finds only a single incident, that the plaintiff had suffered only one fire, that he had only one loss.<sup>49</sup> Consequently, the plaintiff may have had three theories against three separate defendants, but had stated only one claim. Eight, nine, ten. Justice Reed counts McCaskill out and raises Clark's arm, winner by a knockout.

#### IV. A BRIEF ANALYSIS OF SECTION 1441(c), 1948-1990

The opinion in *Finn* does seem to waver between the two schools of thought. Perhaps that is because of the implausible drafting job Congress did in 1948 when it created section 1441(c). Congress discarded the old "separable controversy."<sup>50</sup> Congress could then have made a "separate and independent claim" removable. That would have been the clean, consistent change. Even a statute providing for removal of a "separate and independent cause of action" would have been pure, if purely wrong. Instead, Congress wrote that a

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<sup>44</sup> *Finn*, 341 U.S. at 12-16.

<sup>45</sup> *Id.* at 12 n.5 (stating, "We think the 'claim' set out in a petition states the facts upon which the 'cause of action' rests. For the purpose of removal, the words cover the same allegations."). The meaning of the second sentence of this footnote is clear: the terms are synonymous, at least in this context. The meaning of the first sentence is murky. It seems to imply that the claim is the formal pleading of the inchoate cause of action. If that be the meaning, the Court is simply incorrect, for the claim would be the formal pleading of the inchoate "right of action." See *supra* note 15. Further, that interpretation would imply a cause of action is something different from a claim, which interpretation is then denied by the next sentence.

<sup>46</sup> *Finn*, 341 U.S. at 12-16.

<sup>47</sup> *Id.* at 13 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). Cohen believes this quotation gives McCaskill "a clear endorsement." Cohen, *supra* note 3, at 16. As the following text indicates, however, the language may sound like McCaskill, but the result is pure Clark.

<sup>48</sup> See *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927).

<sup>49</sup> *Finn*, 341 U.S. at 14.

<sup>50</sup> See *supra* note 2 for the superseded statutory language.

“separate and independent claim *or* cause of action” is removable. What is that supposed to mean? At least five possibilities come to mind.

First, the terms were intended to be synonymous, creating a harmless redundancy.<sup>51</sup> This theory does not explain why Congress would intentionally draft a redundant statute. It also does not give weight to the usual rule of statutory construction that every word should be considered and given meaning. Nevertheless, this is the interpretation adopted by the *Finn* Court.<sup>52</sup>

Second, Congress made a drafting error, either in the original draft or in the editing of the legislative process. This explanation must be rejected, since the language was unchanged from the considered proposal of the Revision Committee, and the Reviser’s Note gives no clue of a reason for the use of both terms.

Third, the addition of cause of action to claim may have been a recognition by Congress that many jurisdictions were in 1948—and many remain today—code states. The statute in question does, after all, govern removal from all state courts to federal courts. Under this explanation, claim would refer to removal from a rules state and cause of action would refer to removal from a code state. Again, the Reviser’s Note gives no hint that this was the purpose.

Fourth, use of both terms may have been an attempt to broaden removal jurisdiction, the intent being that claim would be a broad, multi-theory term, and cause of action a narrow, theory-specific term. This interpretation would give meaning to both terms in the statute. It would also mean that *Finn* was wrongly decided. This theory must be rejected out of hand, however, since the Reviser’s Note states the amended statute “will somewhat decrease the volume of Federal litigation.”<sup>53</sup> Granted, this language does not specifically say that the intent of the amendment was to reduce the number of cases removed—although *Finn* so interpreted it—but a statement that the volume of removal cases will be decreased certainly cannot be twisted into a positive intent to increase the possibilities for removal.

Finally, the theory most likely is a combination of inadvertence and stealthy intent. The Revision Committee that drafted the statute was composed of men with national reputations in the field of federal civil procedure.<sup>54</sup> The

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<sup>51</sup> James W. Moore & William VanDercreek, *Multi-Party, Multi-Claim Removal Problems: The Separate and Independent Claim Under Section 1441(c)*, 46 IOWA L. REV. 489, 499 n.44 (1961). Of course, the first author of this article was the primary reviser for section 1441(c), so the argument that he intentionally drafted a redundancy comes with ill grace.

<sup>52</sup> *Finn*, 341 U.S. at 12 n.5.

<sup>53</sup> 28 U.S.C. § 1441(c) reviser’s note.

<sup>54</sup> The members of the Revision Committee for the Judicial Code of 1948 were William W. Barron, West Publishing, Chief Reviser; Walter Armstrong, former ABA President; Professor John Dickinson, University of Pennsylvania School of Law; Judge Clarence G. Galston, Eastern District of New York; Alexander Holtzoff; Judge Albert B.

revisers earned these national reputations over years; certainly they all had been trained in the law before 1938. Accordingly, every one of them was trained in, and worked with, the "cause of action" for years. One can only suppose that some or even all of them did not "get it," even ten years after the fact.<sup>55</sup> This does not mean that they all were unreconstructed McCaskillists. Perhaps they were covering their bets by drafting in both terms; the statute does indeed seem impossibly to embrace both McCaskill and Clark. This may have been quite intentional. Probably a larger portion is simply, wrong headedly sticking to the old ways. The committee certainly had no idea it was doing anything controversial with the language.<sup>56</sup> Not one member of the Revision Committee, not one member of Congress, ever wrote, in legislative history, or in legal article, that he or she was attempting to bring McCaskill's theory of cause of action back into federal practice.

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Maris, Third Circuit; Justin Miller; Professor James W. Moore, Yale Law School; Judge John J. Parker, Fourth Circuit; Judge John B. Sanborn, Eighth Circuit; Judge William F. Smith, District of New Jersey; and Floyd E. Thompson. They were assisted by the editorial staffs of West Publishing Co. and Edward Thompson Co. JAMES W. MOORE, MOORE'S COMMENTARY ON THE UNITED STATES JUDICIAL CODE 64, nn.4-7 (1949).

<sup>55</sup> See *supra* text accompanying notes 26-31.

<sup>56</sup> In general, the committee members told Congress that they had made no substantive changes. Congressman Keogh told his colleagues, "[W]e proceeded upon the hypothesis that since that was primarily a restatement of existing law, we should not endanger its accomplishment by the inclusion of the work of any highly controversial changes in law." *Hearings before Subcomm. No. 1 of the House Jud. Comm. on H.R. 1600 and H.R. 2055*, 80th Cong., 1st Sess. 11 (1947). His assertion was based on the statement of Judge Albert Maris, "[C]are has been taken to make no changes in the existing laws which would not meet with substantially unanimous approval." *Id.* at 19. See also Keeffe et al., *supra* note 25, at 571 n.4.

The only word of the Reviser's Note on this statute is the following:

Subsection (c) permits the removal of a separate cause of action but not of a separable controversy unless it constitutes a separate and independent claim or cause of action within the original jurisdiction of United States District Courts. In this respect, it will somewhat decrease the volume of Federal litigation.

28 U.S.C. § 1441(c) reviser's note. Most noteworthy are the first two lines: the committee contrasts the old "controversy" with the new "cause of action," not the new "claim." See *id.*

Certainly, the revisers thought they were simplifying the statute to eliminate litigation over the limits of a "separable controversy." Professor James Moore said as much to Congress: "I believe considerable improvement has been made by Section 1441(c) relative to the removal of separable controversies and separate units—a matter which is in great confusion at the present time." *Hearings before Subcomm. No. 1 of the House Jud. Comm. on H.R. 1600 and H.R. 2055*, 80th Cong., 1st Sess. 29 (1947).

Yet exactly that would have happened, at least in removal jurisdiction, but for *Finn*. *Finn* flatly rejected a separate, theory-specific, party-specific meaning for the statute. Officially, McCaskill's theory was reinterred.

Not everyone has cheered *Finn*. Some writers, self-confessed "students of the McCaskill theory or pleading,"<sup>57</sup> commented caustically that Justice Reed<sup>58</sup> "has swallowed the Yale Law School (*i.e.*, Clark) party line as to 'cause of action' and the Harvard Law School (*i.e.*, Frankfurter) party line as to the viciousness of diversity of citizenship jurisdiction."<sup>59</sup>

Well, so what! I demur. Whoops, wait a second, a slip on the keyboard there; I just used an obsolete term. "Demurrer" is an obsolete, dead term in federal civil procedure.<sup>60</sup> Well, so is "cause of action," yet it stalks the legal landscape like Frankenstein's monster, horrifying the good citizens who thought they had buried the body parts over half a century ago. Maybe Clark should have written the demise into a specific rule, as he did for "demurrer." "Cause of action" is just as cold and stiff as "demurrer," but it does not have the same decency to go away and lie down.<sup>61</sup>

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<sup>57</sup> Keefe et al., *supra* note 25, at 607.

<sup>58</sup> Perhaps by referring only to the author of the opinion, the commentators seek to denigrate it, but in fact they are referring to the opinion of the Court, concurred in by six Justices.

<sup>59</sup> Keefe et al., *supra* note 25, at 605.

<sup>60</sup> FED. R. CIV. P. 7(c) (stating, "Demurrers . . . shall not be used.").

<sup>61</sup> Amble into almost any law school class across the country. The professor will likely say, "Does the plaintiff have a cause of action for this injury?" or "Do these facts give rise to a cause of action?" This language comes from the same people who would not be caught dead using "demurrer," or saying anything, for that matter, without absolute precision.

To repeat, in the first place, the historically correct term is "right of action." Second, the "cause of action," at least for Clarkists, and after all, Clark is embodied in the Federal Rules, never meant any narrow, single theory of recovery. Third, "claim" has entirely supplanted "cause of action" for all purposes in the federal courts and rules states.

At least, the query should be, "Does plaintiff have a claim for this injury," even though that itself would be a slight misstatement, since claim refers to the pleaded transaction. If "does plaintiff have a legally cognizable injury" is cumbersome, then "does plaintiff have a right of action" would at least have the blessing of history.

Unfortunately, these professors are merely passing along to their students the misstatement foisted on them by their own professors. Our most distinguished authorities yet today sometimes write "cause of action" when they mean "claim." Only within this narrow area of separate claim removal jurisdiction, a few examples suffice. *E.g.*, 1A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.162[1] (2d ed. 1993) (footnote omitted) [hereinafter MOORE'S FEDERAL PRACTICE]:

In other words a fragment of a cause of action can no longer furnish a basis for removal; one of two or more causes of action may do so. To prevent the old separable controversy wine from being served under the new label, courts have properly given a broad meaning to "cause of action." Thus where a group of operative facts gives rise to

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a claim on the part of the plaintiff, as where several persons contribute to his injury and he sues one or more of them in one action, the plaintiff is proceeding on one cause of action, and it is not removable under § 1441(c).

*Id.*

At least the authors used "claim" once! The reader might also note that Professor Moore, the primary author, is also the man responsible for foisting the disjunctive language of section 1441(c) on unsuspecting lawyers, judges, and litigants. The other leading treatise on federal civil procedure perpetuates the same mistake, although notably to a much less egregious degree. WRIGHT, ET AL., *supra* note 3, § 3724, at 368, 384 ("The Finn case held that there is but a single cause of action . . . . There are a few additional rules limiting the notion of what constitutes a separate and independent cause of action."). Even the commentator chosen to explain the 1990 statutory amendment is not blameless. While properly using "claim" throughout, he does slip once, "There was but a single cause of action here [in *Finn*]." David D. Siegel, *Commentary on 1990 Revision*, in 28 U.S.C.A. § 1441(c) (West Supp. 1993). Of course, as mentioned previously, even the Reviser's Note to the 1948 amendment used this language. *See supra* note 56.

Perhaps a person should not be so dogmatic about this difference, which could be viewed as a semantic quibble. Many today consider the terms "claim" and "cause of action" to be interchangeable. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 14.4, at 619 n.1 (1985); 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.410[1], n.2 (2d ed. 1993); Gibson, *supra* note 14, at 47 n.199. Maybe "cause of action" has acquired a prescriptive right to exist. Yes, both the common law and the English language are constantly growing. Maybe cause of action today means something quite different from what it did in 1938. But we are dealing here with a legal term, a legal term of art, finely honed after a protracted battle over its meaning. This is not a mere semantic difference. The meaning should be changed only by intention, not by benign neglect, even over a period of years.

After all, the only serious frontal attack by the McCaskillites since 1938 was defeated soundly. In the early 1950s, the Ninth Circuit proposed that FED. R. CIV. P. 8(a)(2) be amended to require pleading of "facts necessary to state a cause of action." *See* Marcus, *supra* note 31, at 445. The proposal was summarily rejected by the Advisory Committee. *See id.* (citing REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (1955)). Of course, at that time, Clark was still around to fend off attacks on the claim, such as the attempt by some judges in the Southern District of New York to require more specific pleadings in large cases. *See* Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 49 (1957). Since Clark's passing, the special pleading advocates have made some progress, although the RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1982) certainly views claim through Clark's vision. The Supreme Court once again has reaffirmed Clark's rejection of special pleading requirements in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993).



Others have complained that *Finn*'s interpretation of section 1441(c) means that few cases will be removed successfully under it.<sup>62</sup> Again, so what! That was the policy choice of Congress, enforced by the Court.

Some critics have attempted to limit *Finn* strictly to its facts, a case involving one plaintiff suing multiple defendants in the alternative for a single recovery.<sup>63</sup> These critics are largely of two types: McCaskillites fighting a rear guard retreat who do not realize their base camp has been captured,<sup>64</sup> or fans of federal courts expanding their jurisdiction to the extent possible, oblivious to the proposition that federal courts are courts of limited jurisdiction.<sup>65</sup> This Article will not address these multiple party questions, or other related questions,<sup>66</sup> but suffice it to say that the *Finn* tent is broad enough to encompass many multi-party litigations.<sup>67</sup> Despite the criticism of *Finn* by

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<sup>62</sup> E.g., Duke Duvall, *Removal—The "Separate and Independent Claim,"* 7 OKLA. L. REV. 385 (1954); Moore & VanDercreek, *supra* note 51, at 497; Note, *Removal Under Section 1441(c) of the Judicial Code*, 52 COLUM. L. REV. 101, 106-07 (1952) [hereinafter *Removal Under Section 1441(c)*].

<sup>63</sup> For example, Cohen states,

In fact, the opinion in *Finn* contains enough "all-things-to-all-men" language in defining a cause of action to create debate, at least, in the following types of multiple-party cases: multiple-defendant cases where payment of a judgment against one defendant need not be credited in full to other defendants; multiple-defendant cases where plaintiff is seeking relief other than money damages; multiple-plaintiff cases; and cases where controversies are introduced by counterclaim, cross-claim, third-party claim, intervention or garnishment.

Cohen, *supra* note 3, at 14-16 (footnotes omitted).

<sup>64</sup> *Id.*; e.g., Keefe et al., *supra* note 25, at 607.

<sup>65</sup> E.g., Moore & VanDercreek, *supra* note 51, at 496 ("A broad and liberal construction of Article III of the Constitution in favor of federal judicial power is proper; its language has a living flexibility.").

<sup>66</sup> Also beyond the scope of this Article is discussion of the possible shifting meaning of "claim" in other contexts, such as appealability of multiple claims under FED. R. CIV. P. 54(b) or res judicata. See Gibson, *supra*, note 14, at 43, 59.

<sup>67</sup> A single claim can include multiple plaintiffs. CLARK, *supra* note 12, at 139-40; WRIGHT, ET AL., *supra* note 3, § 3724 at 386-88; *Removal Under Section 1441(c)*, *supra* note 56, at 106-07; see also cases collected in 28 U.S.C.S. § 1441, at 522-24 (Law. Co-op. 1988). A single claim can include multiple defendants. MOORE'S FEDERAL PRACTICE, *supra* note 61, ¶ 0.163[4.-5], at 331-35; Clark, *supra* note 11, at 834-36; see also cases collected in 28 U.S.C.S. § 1441, at 524-25 (Law. Co-op. 1988).

The removability of counterclaims, cross-claims, and third-party claims under section 1441(c) has not yet clarified. One would suppose that only compulsory counterclaims present any compelling reason to fight over removability, because they must be brought. All of these other joinder devices are permissive, so if the party holding a third-party claim, for example, wants to bring it in federal court, the party need only assert it in an independent

some commentators, both the letter and the spirit of the opinion have been relatively well applied by the lower federal courts.<sup>68</sup>

Such is the history of the statute to 1990. Even though the statute encompassed both federal question and diversity cases, it had originally been designed in 1948 primarily for diversity cases.<sup>69</sup> Of course, the great bulk of the decisions from 1948 to 1990 involved diversity cases. Then in 1990, Congress whittled a great chip—the diversity cases chip—from section 1441(c), leaving the statute to operate only on federal question cases. We proceed to examine what really remains.

## V. THE EXTENT OF A FEDERAL “CASE”

Once a separate and independent claim provides a federal jurisdictional basis for removal, the statute allows removal of the “entire case.” This means whatever other portions of the litigation are comprised in the same constitutional “case” can ride into federal court as part of—not with—the jurisdictionally sufficient claim.

The concept of the constitutional “case” requires us to make a brief exploration of the doctrine of supplemental jurisdiction. Years ago, the federal courts developed pendent jurisdiction,<sup>70</sup> which allowed a state law theory to ride into federal court on the strength of a federal law theory so long as both were encompassed within the *same cause of action*. This necessarily required interpretation of “cause of action,” and in *Hurn v. Oursler*,<sup>71</sup> the Supreme Court a generation earlier than *Finn* defined cause of action broadly, along the lines urged by Clark.

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action. Generally, section 1441(c) has not been applied to allow removal of these other joined claims as separate and independent, although the reason given has varied. See WRIGHT, ET AL., *supra* note 3 at 388–91; Note, *Third-Party Removal under Section 1441(c)*, 52 FORDHAM L. REV. 133 (1983). Some commentators narrowly conclude that the section applies only to claims of the plaintiff. See MOORE’S FEDERAL PRACTICE, *supra* note 61, ¶ 0.163[4.-6] at 352. A recent trend has developed in federal courts, however, to hold that such facts constitute a single transaction or interlocked series of transactions, in clear pursuit of the Clark/*Finn* rationale. See cases collected in 28 U.S.C.S. § 1441, at 88 (Law. Co-op. Supp. 1990).

<sup>68</sup> The cases are collected in Cohen, *supra* note 3, at 13 n.54; Moore & VanDercreek, *supra* note 51, at 502 n.65; and Note, *Civil Procedure—Boggs v. Lewis: Removal of Insurance Bad Faith Claims Under 28 U.S.C. § 1441(c): The Legal Independence and “Same Transaction, Same Relief” Tests*, 20 MEM. ST. U. L. REV. 253, 258 n.35 (1990).

<sup>69</sup> Cohen, *supra* note 3, at 19.

<sup>70</sup> The history is developed in Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 COLUM. L. REV. 1018 (1962).

<sup>71</sup> 289 U.S. 237 (1933). The plaintiff’s two theories of patent infringement and unfair competition were concluded to be “different grounds asserted in support of the same cause of action.” *Id.* at 247. Quite clearly, this would be Clark’s conclusion, not McCaskill’s.

Another generation later, following promulgation of the Federal Rules, birth of the “claim,” and official death of the “cause of action,” the Supreme Court was again called on to interpret the scope of pendent jurisdiction, this time in *United Mine Workers v. Gibbs*.<sup>72</sup> In *Gibbs*, the plaintiff sued the defendant labor union on two theories: a federal question theory of labor law violation, and a state law theory of unfair competition.<sup>73</sup> The facts supporting both of these theories were inextricably twined. Even under law prior to the federal rules, the plaintiff would have been pleading two theories of a single cause of action. Certainly, the same is true under the Federal Rules; plaintiff had two theories of a single claim.

The Court began by calling its thirty-three year-old *Hurn* test “unnecessarily grudging,”<sup>74</sup> because it was based on the obsolete “cause of action,” even though application of that test would have reached the same result *Gibbs* eventually reached. The Court thus once again threw the cause of action into the trash can, and pointedly referred only to claim.<sup>75</sup> In redefining pendent jurisdiction to deal with claims rather than causes of action, the Court concluded pendent jurisdiction exists in the following situation:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.<sup>76</sup>

Clark could hardly have written it better. The common nucleus of operative fact forms a litigation block that a lay plaintiff would expect to try together. That, according to *Gibbs*, is a constitutional “case.” That, according to Clark, is a “claim.”<sup>77</sup> Under either approach, that is the limit of federal jurisdiction.<sup>78</sup> Pendent jurisdiction became part of supplemental jurisdiction in 1990.<sup>79</sup>

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<sup>72</sup> 383 U.S. 715 (1966).

<sup>73</sup> *Id.* at 715.

<sup>74</sup> *Id.* at 725.

<sup>75</sup> See *id.* Actually, the Court's opinion here is not quite as sure-footed as one could hope. While the opinion clearly refers only to claim and claims, and clearly embraces Clark's theory of pleading, it repeats an error. For example, the Court writes, “[W]henever there is a claim ‘arising under’ . . . and the relationship between that claim and the state claim . . . .” *Id.* at 725. The error is reference to claims. One claim was pleaded. The plaintiff had multiple theories of recovery, on one claim.

<sup>76</sup> *Id.* at 725.

<sup>77</sup> See *supra* text accompanying notes 19–22. The choice of the *Gibbs* Court was to call a common nucleus of operative fact a case. *Gibbs*, 383 U.S. at 725. Earlier tests informed the *Gibbs* language choice. See Richard A. Matasar, *Rediscovering One “Constitutional Case”: Procedural Rules and the Rejection of the Gibbs Test for Supplemental Jurisdiction*, 71 CAL. L. REV. 1399, 1448–49 (1983). Clark himself had

## VI. BLENDING SECTION 1441(c) AND SUPPLEMENTAL JURISDICTION

As the preceding discussion has shown, *Finn* interpreted section 1441(c) broadly and consistently with the Clark theory of claim. So long as the different theories arose from a single transaction or series of transactions, and a lay person would expect them to be tried together, one claim would exist.

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previously written of the need for an "identity of operative facts" in *Lewis v. Vendome Bags, Inc.*, 108 F.2d 16, 19 (2d Cir. 1939), *cert. denied*, 309 U.S. 660 (1940) (Clark, J., dissenting). In another opinion, Clark thought that a "fundamental core" of facts formed the case. *Musher Foundation v. Alba Trading Co.*, 127 F.2d 9, 12 (2d Cir.), *cert. denied*, 317 U.S. 64 (1942) (Clark, J. dissenting).

While McCaskill of course denied the existence of a single cause of action, he might well have agreed with the result in *Gibbs*, for he defined "transaction" in lay terms much the same as Clark previously defined cause of action and claim. See McCaskill, *supra* note 15, at 646-47 ("It is the totality of operative facts which, determined by the principle of administrative convenience, can be dealt with in one suit."). Justice Reed, the author of *Finn*, used similar reasoning in *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 324-35 (1938); the language was cited for support by *Gibbs* for the crucial common nucleus of operative fact language. See *Gibbs*, 383 U.S. at 725 n.13.

<sup>78</sup> *Gibbs* "delineated the constitutional limits of federal judicial power." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 371 (1978). See generally Matasar, *supra* note 77 at 1414-16; Swing, *supra* note 3, at 590-92.

At least one commentator has suggested the *Gibbs* test is alternative in form. That is, pendent jurisdiction exists either when there is a common nucleus of operative fact or when the plaintiff would expect to try the matters together. Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 935 n.72 (1988). This reading of the penultimate paragraph of *Gibbs* is strained indeed, and its basis is not detailed by the commentator. Perhaps the interpretation turns on the admittedly inappropriate use of "but if" in the middle of the paragraph; that language can reasonably be considered only as a slip of the editing process. If no common nucleus of operative fact exists between two matters, then no reasonable plaintiff would expect to try them together. Consequently, the test is unitary.

<sup>79</sup> The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 created a new 28 U.S.C. § 1367, supplemental jurisdiction, which encompasses the former pendent jurisdiction:

[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 U.S.C. § 1367(a) (Supp. II 1990).

Removal could not be accomplished. Only when an entirely unrelated matter was joined would a separate and independent claim be asserted, allowing removal under section 1441(c).

This understanding of claim dovetails nicely with the *Gibbs* interpretation of claim and constitutional case. The case includes a common nucleus of operative fact that a lay person would expect to be tried together. When this is so, pendent jurisdiction, now supplemental jurisdiction, exists over the state law portion of the same constitutional case.

What this means today in the language of the 1990 removal statute is that supplemental jurisdiction is essentially coextensive with removal jurisdiction under the basic removal statute, section 1441(a):

[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.<sup>80</sup>

Consequently, so long as any state law theory is based on the same facts as the federal law theory, it is part of the same claim and the same constitutional case, and so is removable under section 1441(a) and supplemental jurisdiction of section 1367. Section 1441(c) is therefore left to operate solely on a set of facts, that is, a claim, that is truly separate and independent.

Accordingly, section 1441(a) and section 1441(c) cover the entire field. Either the state law theory is part of the same claim and so qualifies for supplemental jurisdiction to the federal law theory, or the state law theory is separate and independent and so qualifies for removal as a separate and independent claim.<sup>81</sup>

Some commentators have argued that these two categories do not cover the field, that a third category exists in the middle. Stating their argument will reveal its flaw. They say that section 1441(c) allows removal only of completely separate and independent claims. So far, so good. They then point out that supplemental jurisdiction under section 1441(a) reaches only so far as the limits of the claim. Again, we follow. Then they define claim narrowly. Whoa! Here's the error. The Clark claim, just as was cause of action, is not a

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<sup>80</sup> 28 U.S.C. § 1441(a) (Supp. II 1990) (in part).

<sup>81</sup> Other commentators agree. RICHARD H. FIELD ET AL., *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* at 53 (Supp. 1993); MOORE'S *FEDERAL PRACTICE*, *supra* note 61, ¶ 0.163[2] (Supp. 1992-93); Charles Rothfeld, *Rationalizing Removal*, 1990 B.Y.U. L. REV. 221, 237; David D. Siegel, *Commentary on 1990 Revision*, 28 U.S.C.A. § 1441 (West Supp. 1992).

One commentator points out that section 1441(c) can still operate only in the narrow area in which another federal statute prevents complete removal, such as workers' compensation cases. Oakley, *supra* note 7, at 749-50 n.45.

narrow concept, but instead is exceedingly broad; because the Clark claim is indisputably written into the Federal Rules, one can hardly see any room for argument for a narrower definition. But let them finish for a moment. Because claim is narrow and supplemental jurisdiction covers only the limits of the claim, and section 1441(c) covers only an entirely separate claim, there must be some cases in the middle, with sufficient factual relatedness to be part of the claim, but not in the common nucleus of operative fact.<sup>82</sup> Post-*Gibbs*, this simply cannot be.<sup>83</sup> Perhaps these suggestions should be tastefully ignored, since they were made pre-*Gibbs*, before the Court made clear that the federal claim/case is much broader than the commentators had thought. Because this argument is based on a discarded vision of claim—in fact, the vision was of cause of action—it need detain us no longer.<sup>84</sup>

## VII. THE REMAINING, UNCONSTITUTIONAL STUB

Prior to the massive revision by the Judicial Code of 1948, section 1441(c) applied only to diversity cases.<sup>85</sup> No serious constitutional challenge to it was entertained by the courts, although commentators discussed the subject.<sup>86</sup> In 1948, Congress added federal question separate claim removal. The addition was unusual, because the Revision Committee and Congress believed they were restricting separate claim removal.<sup>87</sup> This suggests Congress at that time did not even consider the applicability of section 1441(c) to federal question cases. Nevertheless, from 1948 until 1990, the statute continued to operate in diversity cases. In 1990, Congress whittled away diversity from separate claim

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<sup>82</sup> John H. Lewin, *The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 HARV. L. REV. 423, 441 (1953); Moore & VanDercreek, *supra* note 51, at 506 n.81.

<sup>83</sup> See *supra* text accompanying notes 72–78.

<sup>84</sup> Also to be discounted are more recent comments pointing out that pendent party jurisdiction may pose problems, because the facts involving the new party may be closely related (not separate and independent) yet parties are not covered by pendent jurisdiction. WRIGHT, ET AL., *supra* note 3, § 3724 at 400–02; Rothfeld, *supra* note 81, at 237–38. Since the 1990 amendment to 28 U.S.C. § 1367 (Supp. II 1990) now allows pendent parties to be included in the same constitutional case, this problem disappears.

<sup>85</sup> 28 U.S.C. § 71 (1940) permitted removal of a separable controversy, "which is wholly between citizens of different states." See *supra* note 2.

<sup>86</sup> See Cohen, *supra* note 3, at 22, 34; Edwin R. Holmes, *The Separable Controversy—A Federal Removal Concept*, 12 MISS. L.J. 163, 170–71 (1939); Arthur J. Keeffe & Frederick B. Lacey, *The Separable Controversy—A Federal Concept*, 33 CORNELL L.Q. 261, 262–63 (1947); Keeffe et al., *supra* note 25, at 600–01; Note, *Separation of Causes in Removal Proceedings*, 41 HARV. L. REV. 1048, 1049 n.13 (1928); Note, *The Constitutionality of Federal Removal Jurisdiction Over Separable Controversies Involving Citizens of the Same State*, 94 U. PA. L. REV. 239, 241–45 (1946).

<sup>87</sup> See *supra* note 56.

removal jurisdiction. Only from that time forward has section 1441(c) been limited to federal question cases.

So what remains today is this. When the state law theory is factually related to the federal question theory, it would be part of the same case and expected to be tried together; consequently, supplemental jurisdiction provides the authority for the federal court to proceed under section 1441(a). Only when the state law matter is not factually related does section 1441(c) govern. The situation would have to be something like the following. Plaintiff sues defendant for a violation of the civil rights laws, a federal question. In count two, plaintiff joins a factually related breach of contract theory. Supplemental jurisdiction under section 1367 brings this theory into federal court. No argument so far. In count three, plaintiff joins a completely unrelated breach of contract, a garden variety state law claim. The terms of section 1441(c) sweep count three into federal court on the jurisdictional strength of count one. Is such a result constitutional?

We can find initial guidance in earlier commentaries, although with a single exception, these earlier analyses predate not only the 1990 revision but also *Gibbs*, and so are largely obsolete. Nevertheless, they provide a first foundation in our consideration.

As a reviser of the Judicial Code of 1948, Professor Moore had the first opportunity to consider the constitutionality of section 1441(c). He opined that "Congress could constitutionally make the statutory grant of removal jurisdiction broader than its statutory grant of original jurisdiction."<sup>88</sup> Because Moore has restated his position more recently and more fully, analysis of it will be deferred for now.

The 1948 revision brought a spate of comments on the constitutionality of section 1441(c),<sup>89</sup> but the next major analysis came five years later from Professor Lewin.<sup>90</sup> Disagreeing with Moore, he concluded that the section could operate unconstitutionally. Lewin's conclusion is based primarily on his reading of *Hurn v. Oursler*,<sup>91</sup> the leading pendent jurisdiction case prior to *Gibbs*. He noted that in *Hurn*, the Court examined a complaint with three counts: copyright infringement of a play, unfair competition for the same version of the play, and unfair competition for a revised, uncopyrighted version

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<sup>88</sup> MOORE, *supra* note 54, at 253.

<sup>89</sup> See, e.g., Duvall, *supra* note 62, at 391; Note, *Courts—U.S. Code Judiciary and Judicial Procedure—Removal of Causes under the Revised Judicial Code*, 33 MINN. L. REV. 738, 742 n.19 (1949); Note, *Federal Jurisdiction: Removal: Judicial Code Section 1441(c): Removable "Separate and Independent Claim or Cause of Action,"* 40 CAL. L. REV. 317, 320 n.18 (1952); Note, *The "Separable Controversy" Problem of Federal Jurisdiction: How Affected By The New Judicial Code?*, 10 U. PITT. L. REV. 385, 389 (1949).

<sup>90</sup> Lewin, *supra* note 82.

<sup>91</sup> 289 U.S. 238 (1933).

of the play.<sup>92</sup> The first count was of course a federal question. The second count qualified for pendent jurisdiction because it was part of the same cause of action and inseparable. The constitutional basis for hearing this count depended on the principle of *Osborn v. Bank of the United States*,<sup>93</sup> which stated that so long as a federal question forms "an ingredient of the original cause," Congress can properly grant the federal courts power to hear the entire "cause," or case.<sup>94</sup> As to the third count, the *Hurn* Court decided it was a separate and distinct cause of action, not part of the same case, and so beyond the jurisdiction of the federal court.<sup>95</sup>

Lewin accordingly concluded that a theory not coming within the pendent jurisdiction of the court would not have any basis for federal jurisdiction.<sup>96</sup> Since section 1441(c) provided for the federal court to hear separate and independent claims or causes of action, it unconstitutionally brought these claims or causes of action into federal court.

Responding to Lewin, Professors Moore and VanDercreek argued strongly that section 1441(c) could constitutionally bring an unrelated claim into federal court.<sup>97</sup> They rejected the idea that *Hurn* involved any constitutional construction and said it was only a statutory interpretation.<sup>98</sup> "[T]he fact that the district court's removal jurisdiction under section 1441(c) is broader than its original jurisdiction means only that statutory removal is broader than *statutory* original jurisdiction."<sup>99</sup> In other words, the authors apparently reasoned that because *Osborn* requires only a federal ingredient for federal jurisdiction, Congress had by statute properly made removal jurisdiction broader than original jurisdiction.<sup>100</sup>

Identifying weaknesses in both the constitutional attack and the defense, Professor Cohen eventually sided with the defenders of the statute.<sup>101</sup> He argued that section 1441(c) fulfills the legitimate Congressional purpose of

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<sup>92</sup> Lewin, *supra* note 82, at 433.

<sup>93</sup> 22 U.S. (9 Wheat.) 738, 823 (1824).

<sup>94</sup> *Id.* at 824.

<sup>95</sup> *Hurn*, 289 U.S. at 245-46. As the reader might suspect from the discussion earlier in this Article, this author disagrees with the Court's conclusion that count three constituted a separate cause of action, but that question need not be explored for the purposes of the present discussion.

<sup>96</sup> Lewin, *supra* note 82, at 433.

<sup>97</sup> Moore & VanDercreek, *supra* note 51.

<sup>98</sup> *Id.* at 498. Cohen also criticized Lewin's "assumption" that *Hurn* delineated the limits of federal judicial power. Cohen, *supra* note 3, at 36-37.

<sup>99</sup> Moore & VanDercreek, *supra* note 51, at 496. This language of course echoed Moore's statement in 1949. See *supra* note 88.

<sup>100</sup> See Moore & VanDercreek, *supra* note 51, at 498.

<sup>101</sup> Cohen, *supra* note 3.



“protection of litigants’ access to the federal courts.”<sup>102</sup> He noted the trend toward joinder of all matters that can efficiently be tried together, and feared that parties may not have “a truly free choice between state and federal court,” so he opined, “[T]he constitutional scope of pendent jurisdiction in federal question cases should encompass, at a minimum, all claims which can be expeditiously tried in a single proceeding.”<sup>103</sup>

All of these prior analyses are seriously limited because they predate *Gibbs*, and so they have been sketched rather briefly. Only one commentary post-dates *Gibbs*. It will be developed and criticized in some detail.

This commentary once again is by Professor Moore, his third defense of the constitutionality of the statute, each time with more length and vigor, and each time with a new co-author.<sup>104</sup> His conclusion is the same as sketched earlier, that so long as a federal question is an ingredient of the case, federal judicial power exists over the whole case.<sup>105</sup>

Moore’s analysis to reach this conclusion is important enough and succinct enough to reproduce in full:

A broad and liberal construction of Article III of the Constitution, in favor of federal judicial power is proper; its language has a living flexibility.

....

A harder case, perhaps, is where there is no diversity to support removal; claim 1 involves a federal matter warranting removal, but claim 2 involves only a local, and unrelated matter. While this suit could not be brought originally in the federal district court under the *Gibbs* doctrine, the fact that claim 2 is unrelated to claim 1 does not necessarily put it beyond the pale of ancillary jurisdiction. . . .

The authority conferred on Congress by the Constitution is not limited to a legislative course of perfection. It does not seem unwise, to us, that Congress has provided for a removal of the entire action, with discretion in the district court to remand claim 2 if it thinks this is proper. But assuming lack of legislative wisdom, that in itself does not invalidate § 1441(c).

And in *State Farm Fire & Casualty Company v. Tashire* the Supreme Court laid to rest any doubts as to the constitutionality of removal under Section 1441(c) of an entire case involving multiple plaintiffs or multiple defendants where complete diversity is lacking, but where diversity exists as to at least one separate and independent claim. In such cases the claims, if properly joined, may be totally unrelated. It follows from the *Tashire* decision that the constitutional validity of § 1441(c) is not affected where original

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<sup>102</sup> *Id.* at 38.

<sup>103</sup> *Id.* at 38, 39.

<sup>104</sup> MOORE’S FEDERAL PRACTICE, *supra* note 61, ¶ 0.163[3]. The two previous versions were MOORE, *supra* note 54, at 253 and Moore & VanDercreek, *supra* note 51, at 495–98.

<sup>105</sup> See *infra* text accompanying note 106 and criticism *infra* text accompanying notes 107–08.

federal jurisdiction over the separate and independent claim is based on a federal question rather than diversity.<sup>106</sup>

A number of unbridged chasms mar this argument. First, Moore and Ringle start from a proposition that is not only wrong but also is 180 degrees from the accepted wisdom. They say that Article III must be interpreted broadly, with living flexibility.<sup>107</sup> Without broadening this analysis into a full blown constitutional law debate, I state only my definite impression that everyone accepted the fact that the federal government is one of limited powers, and that the federal courts, as courts of limited jurisdiction, have only so much jurisdiction as the Constitution and Congress have given them. Should that proposition be so, and it does not even seem to need citation support, then the authors have reached the wrong conclusion because they have started their search facing in the wrong direction.

Looking beyond this initial error, we find the authors appear to be saying that so long as the federal question comprises an ingredient of the litigation, then *Osborn* grants the federal court jurisdiction over the entire case.<sup>108</sup> Let us grant that is so. It does not help their argument, for the flaw is that section 1441(c) today stretches beyond the "entire case."

The patency of the constitutional rub is apparent in a rather simple analysis. We start with a nondiversity case with a federal question in it. Such a case gives the federal court jurisdiction, whether on an original or removal basis. That federal question allows the federal court to decide other portions of

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<sup>106</sup> MOORE'S FEDERAL PRACTICE, *supra* note 61, ¶ 0.163[3], at 317, 320-21 (footnotes omitted).

<sup>107</sup> *Id.* at 317. The only support offered for this extraordinary statement is a citation to *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), which offers as much support as a sinking man will find in quicksand. See discussion of *Tashire* *infra* note 108.

<sup>108</sup> Rather than citing *Osborn*, the authors chose to rest on the authority of *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523 (1967), which of course was an interpleader case. Clearly they refer to the early portion of the opinion that in less than a page and a half resolves a debate that simmered for a century and a half. MOORE'S FEDERAL PRACTICE, *supra* note 61, ¶ 0.163[3], at 321. In *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), the Court laid down the rule of complete diversity, but the basis as constitutional or statutory was not clarified. See *id.* Finally, *Tashire* said that *Strawbridge* was statutory construction only, so that the interpleader statute requiring only minimal diversity was within the Constitution. *Tashire*, 386 U.S. at 531.

Be that as it may, one must remember that an interpleader case, by its very nature, involves a common res, and so a common nucleus of operative fact. No matter how many claimants are involved, they are all bound up in their interest in the common res, so their interests are all part of the same constitutional case. Surely, this situation provides no support for an argument that a matter completely and totally factually unrelated to the federal ingredient is part of the same constitutional case solely because state joinder law allows the two matters to be pleaded together.

the case that would not by themselves properly be in federal court; such is the doctrine of supplemental jurisdiction. In fact, the court can decide the entire *case*, so long as the federal question forms an ingredient of the case. Thus says *Osborn*.

So now we reach the demarking of the outer limits of the constitutional *case*. A choice of limits could be suggested. The case may be limited to matters included in the same claim, defined in the broad Clark sense. The case might be limited to the same transaction or series of transactions. The case may be limited to the common nucleus of operative fact, and encompass all matters that a lay person would ordinarily expect to be tried together. Thus says *Gibbs*, and *Gibbs* has been interpreted as defining the outer limits of a constitutional case.<sup>109</sup>

Probably we should adopt the *Gibbs* formulation, but no matter which of the above we choose, the exercise of federal jurisdiction over the portion of the litigation beyond the constitutional case remains unconstitutional, even beyond the broad reach of *Osborn*. And that is exactly what, and only what, section 1441(c) encompasses.

Let us return to our earlier example. The litigation is brought in state court absent diversity for count one, a violation of the civil rights laws in terminating an employee; count two, a common law breach of the employment contract; and count three, a breach of contract in an entirely unrelated side business deal between the parties.

Count one, the federal question, allows defendant to remove the case to federal court under section 1441(a). Count two clearly arises out of the same claim, the same transaction, the same nucleus of fact, the same trial unit, so it is not separate and independent, and section 1441(c) does not operate. The count can, however, be removed for the very same considerations under the doctrine of supplemental jurisdiction in section 1367. That is why the correct, broad interpretation of the *claim* is so important.

Count three just as clearly does not arise out of the same claim, the same transaction, the same nucleus of operative fact, the same trial unit, so it does not qualify for supplemental jurisdiction. These factors do make it a separate and independent claim, however, so it qualifies for removal under section 1441(c) on the strength of count one. Yet count three is beyond the constitutional *case*, no matter which definition of case is adopted. That is what makes the application of section 1441(c) unconstitutional. A part of the case comes within the constitutional aura; anything beyond is consigned to the nether world of unconstitutionality.

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<sup>109</sup> See discussion *supra* note 78.

### VIII. CONCLUSION

The correct, broad definition of claim for purposes of supplemental jurisdiction leaves no constitutional room for section 1441(c), as amended in 1990, to operate. Separate claim removal jurisdiction today can apply only to a theory of recovery completely factually unrelated to the federal question. Such a factually discrete theory is beyond the *Osborn* constitutional case, as the limits were defined in *Gibbs*. Consequently, that operation is beyond the limited authority of the federal courts granted by the Constitution.